

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Case #: 14-040317-FC

CoFA#: 327208

v

SCt#: 154566

DEVAUN LAROY LOPEZ,

Defendant-Appellee.

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**DEFENDANT-APPELLEE'S**  
**SUPPLEMENTAL BRIEF**

PROOF OF SERVICE

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**STATEMENT IDENTIFYING THE JUDGMENT APPEALED**

Defendant-Appellee Devaun Laroy Lopez was found guilty after a jury trial on March 17, 2015 of a number of offenses, the most serious being first-degree murder and conspiracy to commit first-degree murder. (“Judgment Of Sentence Commitment To Department Of Corrections,” 4/20/15.) On April 20, 2015, Mr. Lopez was sentenced to life without parole to the custody of the Michigan Department of Corrections. (Id.)

Mr. Lopez requested the appointment of appellate counsel on April 20, 2015. (“Claim Of Appeal And Order Appointing Counsel,” 4/29/15.) Appellate counsel was appointed on April 29, 2014. (Id.)

In a Published Opinion, the Michigan Court of Appeals vacated the convictions and remanded the case for a new trial.

Plaintiff-Appellant People of the State of Michigan filed an application for leave to appeal on October 13, 2016. (Docket entries.) On February 1, 2017, the Court entered an Order for supplemental briefing on two issues: “(1) whether prior testimony is admissible under MRE 804(b)(1) where the proponent of the statement has caused the declarant to be unavailable under MRE 804(a), regardless of any intent by the proponent to cause unavailability; and, (2) if some form of intent is required, what standards should apply when determining whether the proponent’s actions were intended to cause the declarant to be unavailable.” (“Order,” 2/1/17.)

**STATEMENT OF QUESTIONS PRESENTED**

I. DID THE TRIAL COURT ERR IN FINDING THAT DENNIS HOSKINS WAS UNAVAILABLE AND THUS ALLOWED THE ADMISSION OF HIS PRELIMINARY EXAMINATION TESTIMONY, WHICH VIOLATED DEFENDANT'S RIGHT TO CONFRONTATION?

The Michigan Court of Appeals says "yes."

Defendant-Appellee says "yes."

Plaintiff-Appellant says "no."

The trial court says "no."

II. WHEN A PROSECUTOR ACTS IN A WAY "FOR THE PURPOSE OF PREVENTING THE WITNESS FROM ATTENDING OR TESTIFYING," IS ANY MORE INTENT REQUIRED?

The Michigan Court of Appeals did not reach this question.

Defendant-Appellee says "no."

Plaintiff-Appellant would say "yes."

The trial court did not reach this question.

### STATEMENT OF FACTS

Defendant-Appellee Devaun Laroy Lopez was charged with Co-Defendant Jarriel Laroy Reed with multiple counts involving the murder of Terry Johnson. (“Complaint-Felony,” 5/16/14.) The charges against Mr. Lopez included Open Murder; four counts of Felony Firearm; Conspiracy To Commit First-Degree Murder; Carrying A Dangerous Weapon With Unlawful Intent; and Felon In Possession Of A Firearm. (Id.) The murder occurred on or about October 9, 2013, and Mr. Lopez was charged on May 16, 2014 after the prosecution had discussions with a key prosecutorial witness—Dennis Hoskins. (Id.)

The preliminary examination was held on August 1, 2014. (Transcript, “Preliminary Examination,” 8/1/14.)

#### Preliminary Examination

Testimony from the preliminary examination revealed the fatal shooting of Terry Johnson. (Id.) Johnson suffered from a gunshot wound to the head, which was the cause of death. (Id., pp 16-17.) The manner of death was described as a homicide. (Id., p 17.)

Dennis Hoskins, an inmate within the Saginaw County Jail, testified as being in jail on a pending case of assault with intent to murder; that he was brought into the prosecutor’s office with his attorney; that a proffer statement was entered into; and that he was brought in to discuss the homicide of Terry

Johnson occurring on October 9, 2013. (Id., pp 22-25 and 40.) Hoskins told the police that Mr. Lopez and Reed committed the murder—although he did not witness the shooting. (Id., p 25) Hoskins alleged Mr. Lopez told him “he hopped out, ran up a little bit, like half, it was like block or half a block, or somethin’ like that, shot like three or four times, the gun jammed.” (Id., p 31.) It was revealed that Reed was involved in the murder of Johnson to avenge Reed’s brother getting shot two years ago. (Id., pp 26-27 and 93.) Hoskins alleged that Mr. Lopez was the person who shot, according to what Mr. Lopez and Reed had allegedly revealed, and Reed’s “380 chrome handgun” was used. (Id., pp 29-31 and 38.) He mentioned Mr. Lopez said the person who he shot was named “Zeek,” who Hoskins did not know. (Id., pp 31-35.) Hoskins states that the person who was shot was the “wrong person.” (Id., pp 34-35.) He said he first spoke to the police in February 2014, after reaching out to the police and after he had been charged in a separate matter. (Id., pp 40-42.) Hoskins states that Mr. Lopez had done something to make Hoskins come forward: “It has somethin’ pertainin’ to my case, I really don’t want to speak on it.” (Id., p 45.) He said Co-Defendant Reed gave a statement to the police regarding Hoskins’ case that may have been incriminating towards Hoskins. (Id., p 66.) Hoskins mentioned in his particular case a .38 caliber weapon was involved, which was the same type of weapon to commit the homicide in the present case. (Id., pp 65-65 and 90.)



Grel Rousseau testified as an expert in firearms and toolmarks identification, and mentioned the fired bullet was consistent with a .38 auto caliber fired bullet. (*Id.*, pp 104-110.) Saginaw Police Detective Allen Rabideau testified that the cartridge casings found were consistent with a .38 caliber firing. (*Id.*, pp 116-17.) Detective Bush testified he and other members of the police force canvassed the area; recovered a spent bullet and shell casings; and that he received information that the victim had been receiving threats from an ex-girlfriend and her brother. (*Id.*, pp 131-39.)

Based on the evidence, Mr. Lopez and Co-Defendant Reed were bound over as charged. (*Id.*, pp 146-50.)

### **Pre-Trial**

Dennis Hoskins, who had implicated Mr. Lopez with his testimony at the preliminary examination, was represented by an attorney and stated his desire to testify at the trial. (Transcript, “Motion To Declare Witness Dennis Hoskins Unavailable,” pp 5-7, 3/10/15.) There was a record made on the first day of trial, however, which indicated Hoskins may have felt threatened by the prosecution. (Transcript, “Jury Trial—Volume I of V,” pp 11-16, 3/11/15.) It was reported that the prosecutor told Hoskins he could be charged with a life offense if he provided inconsistent testimony at the time of trial. (*Id.*) The prosecutor cites MCL 750.422 as authority for his claim, stating: “if he provided perjured testimony at a preliminary examination and then

testifies at trial, that I have a right to inform him, if you do that, you can be charged with a life offense, and the court specifically quoted 750.422 which deals with life or any term of years.” (Id., pp 15-16.)

### Trial

Trial commenced on March 11, 2015 with jury selection. (Id., pp 17-136.) After preliminary remarks and opening statements, testimony began with Barry Nelson. (Transcript, “Jury Trial—Volume II of V,” p 23, 3/12/15.)

Barry Nelson testified as the Deputy Director of Saginaw County 9-1-1, and that on October 9, 2013 in the early afternoon numerous calls came in regarding a shooting. (Id., pp 23-26.)

Saginaw Police Officer Jeffrey Wenzell testified he was dispatched on October 9, 2013 at about noon regarding a female subject threatening the caller with a knife; that when he arrived at the location he did not find anyone threatening; and that a short time later he responded to the area again in reference to a shooting. (Id., pp 30-32.) He mentioned Terry Johnson was the person shot and was unresponsive. (Id., p 32.) Officer Wenzell said the victim’s mother (Diane Austin) and Tammy Kinsley were at the scene. (Id., p 34.) Officer Wenzell said that Ms. Austin said Dominique Williams was driving in a burgundy Ford Taurus, and that the shots were fired from the car. (Id., p 38.) Officer Wenzell said Ms. Austin indicated there were more than just one

person in the car, and that she was standing with Johnson and another when the shots were fired. (Id., pp 38 and 43.)

Officer Bradley Holp testified he responded to the scene; observed the victim lying on the ground; and rendered aid to the victim, who was suffering a gunshot wound to the head. (Id., pp 45-47.) He mentioned he assisted in a traffic stop that was related to the homicide; that he had contact with Dominique Williams, who he transported to the police department; and that there were no passengers within the vehicle. (Id., pp 51-53.)

Officer Sal Salazar testified he responded to the scene and provided a description of the vehicle involved in the homicide. (Id., p 56.) From the scene, he went to another location where there was "an unknown male wearing a white, like baseball cap, was shooting from a block away." (Id., p 57.) Officer Salazar said several shell casings were located. (Id., p 58.) He mentioned he spoke with State Trooper Detective Bush, who mentioned a week prior two men were shot and the evidence of that shooting was Hornady .38 shell casings. (Id., pp 59-60.)

Dr. Kanu Virani testified as performing the autopsy on Terry Johnson; that the cause of death was a gunshot wound to the head; and the manner of death was homicide. (Id., pp 78-84.)

Detective Allen Rabideau testified to being dispatched to the scene, and observing fired cartridge casings. (Id., pp 86-87.) He mentioned he processed a

Ford Taurus for evidence, and that Trooper Larrison located a knife and fingerprints were obtained from the knife. (*Id.*, pp 98-100.) The vehicle was registered to Dominique Williams. (*Id.*, p 101.)

Amanda Figueroa testified she spoke to the police in December of 2013 regarding the homicide, and that Co-Defendant Reed admitted that “I did it, I did it, I did it. I got the wrong one, but I did it.” (*Id.*, pp 110-13.) Tonya Nemitz testified she was with Ms. Figueroa when Co-Defendant Reed made his admissions. (*Id.*, pp 120-25.)

Nancy Sepulvedo testified that on October 9, 2013 she heard gunfire, and that she saw a gentleman running past her front door. (*Id.*, pp 130-34.) She mentioned she identified the person who was running from a photographic array, mentioning it looked most like the person she saw running. (*Id.*, pp 137-44.)

After initially stating he desired to testify, Dennis Hoskins decided to remain silent under the Fifth Amendment. (Transcript, “Jury Trial—Volume III of V,” pp 4-6, 3/13/15.) Hoskins said: “The prosecutor’s told me – they threatened me with life in prison.” (*Id.*, p 6.) With Hoskins not testifying at trial, his testimony from the preliminary examination played for the jury as he was declared “unavailable.” (*Id.*, pp 6 and 17-18.)

A recap of Dennis Hoskins’ preliminary examination testimony is as follows: Dennis Hoskins, an inmate within the Saginaw County Jail, testified

as being in jail on a pending case of assault with intent to murder; that he was brought into the prosecutor's office with his attorney; that an agreement was entered into; and that he was brought in to discuss the homicide of Terry Johnson occurring on October 9, 2013. (Transcript, "Preliminary Examination," pp 22-25 and 40, 8/1/14.) Hoskins, told the police that Mr. Lopez and Co-Defendant Reed committed the murder. (*Id.*, p 25) Hoskins alleged Mr. Lopez told him "he hopped out, ran up a little bit, like half, it was like block or half a block, or somethin' like that, shot like three or four times, the gun jammed." (*Id.*, p 31.) It was revealed that Reed was involved in the murder of Johnson to avenge Reed's brother getting shot two years ago. (*Id.*, pp 26-27 and 93.) Hoskins alleged that Mr. Lopez was the person who shot, according to alleged statements of Mr. Lopez and Reed, and that the firearm was Reed's "380 chrome handgun." (*Id.*, pp 29-31 and 38.) He mentioned Mr. Lopez said the person who he shot was named "Zeek," who Hoskins did not know, and that it was the "wrong person." (*Id.*, pp 31-35.) He first spoke to the police in February 2014 about this homicide, after he was charged in a separate matter. (*Id.*, pp 40-42.) Hoskins states he came forward because: "It has somethin' pertainin' to my case, I really don't want to speak on it." (*Id.*, p 45.) He said Co-Defendant Reed gave a statement to the police regarding Hoskins' case that may have been incriminating towards Hoskins. (*Id.*, p 66.) Hoskins mentioned in his particular case a .38 caliber weapon was involved,

which was the same type of weapon used to commit the homicide in the present case. (Id., pp 65-65 and 90.)

Diane Austin testified as being the mother of Terry Johnson; that on October 9, 2013 she received a phone call from Johnson's girlfriend (Dominique Williams); and that she overheard Johnson and Ms. Williams having a "raging argument." (Transcript, "Jury Trial—Volume III of V," pp 22-25, 3/13/15.) Ms. Austin said she later saw Ms. Williams while Ms. Austin was in a vehicle with her husband, Johnson, and Tammy Tinsley, and that Dominique Williams was "road raging us." (Id., pp 25-26.) She mentioned that Williams said "she was going to kill me and my son." (Id., p 28.) Ms. Austin said later in the day Ms. Williams continued to call. (Id., p 31.) She mentioned both Johnson and herself called the police to inform the police of Williams' threats. (Id., pp 36.) Thereafter, she heard six gunshots; heard her son yell "Ma;" and saw her son fall to the ground. (Id., pp 37-38.) Ms. Austin said she called the police and told the police Ms. Williams was involved in the shooting. (Id., p 39.)

Detective Sergeant James Bush testified he canvassed the area; spoke to witnesses; and located six shell casings. (Id., pp 45-46.) He mentioned he was also part of an investigation team regarding an October 1<sup>st</sup> incident involving Hoskins. (Id., p 57.)

Duane Jackson said he knows Co-Defendant Reed; that he was going to sell some “weed” to Reed; and that in exchange for the marijuana, Reed offered a .38 caliber firearm. (Id., pp 65-66.)

Detective David Kerns testified Co-Defendant Reed made phone calls from the Saginaw County Jail regarding a plea offer on January 23, 2015 and January 24, 2015. (Id., pp 69-72.) Detective Andrew Carlson testified he was involved in the investigation of the shooting of Vestie Reed, who is the brother of Co-Defendant Reed. (Id., pp 81-82.) Detective Sergeant Grel Rousseau testified as an expert in firearm and tool marks identification; that he analyzed shell casings that came from a .38 caliber firearm; that all of the shell casings were fired from the same firearm; and that bullets recovered also were fired from a .38 caliber firearm. (Id., pp 88 and 94-104.)

Detective Jessica Welton testified she was assigned to investigate the homicide shooting occurring on October 9, 2013; that Dennis Hoskins was charged with a shooting occurring on October 1, 2013; and that Co-Defendant Reed was interviewed regarding the October 1, 2013 shooting. (Id., pp 109-111.) She mentioned she questioned Mr. Lopez about the October 1<sup>st</sup> shooting; that Mr. Lopez initially denied knowledge; and that later in the interrogation, Mr. Lopez admitted to being in the vehicle on this other homicide. (Id., pp 113-15.) She said she was unable to locate the .38 handgun regarding the present case. (Id., p 116.) Detective Welton testified Hoskins took a plea on



his case. (*Id.*, p 117.) She said Dominique Williams was interviewed, and that Ms. Williams had attempted to call Terry Johnson two or three times after he had been shot. (*Id.*, p 119.) Detective Welton mentioned Co-Defendant Reed was connected with a white Charger that was of significance to the case since the Charger is what Reed was driving when the shooting took place. (*Id.*, pp 120-22.) Text messages from Reed to Katrina Call after the shooting indicated to “lay low.” (*Id.*, p 123.) Detective Welton admitted that Dominique Williams was an “obvious suspect” as she had made threats against Johnson. (*Id.*, pp 127-28.)

Regarding Hoskins, Detective Welton indicated statements made by Hoskins were a pay-back because Mr. Lopez and Co-Defendant “both fucked him over.” (*Id.*, pp 130-31.) Detective Welton admitted that Hoskins’ testimony was inconsistent with the phone records. (*Id.*, p 140.) She admitted Hoskins was upset with Mr. Lopez. (*Id.*, p 141.)

Robert Dunn, who was the attorney for Dennis Hoskins, said that Hoskins chose not to testify because he was threatened with life in prison if he perjured himself. (Transcript, “Jury Trial—Volume IV of V,” pp 5-6, 3/16/15.) He admitted that perjury at a preliminary examination in a murder case is a 15-year offense, while perjury at a trial in a murder case is a life offense. (*Id.*, pp 6-7.) Mr. Dunn said that Hoskins was initially charged with



the life offenses of three counts of assault with intent to murder that were reduced to 4-year offenses of felonious assault. (Id., pp 8-9.)

Tammy Kinsley, who was in jail, testified as being in a relationship with Terry Johnson; that she was aware that Dominique Williams and Johnson had dated each other; and that Ms. Williams had made threats with a knife. (Id., pp 16-18.) She mentioned Williams had called a number of times on the day of the murder. (Id., pp 18-19.) Ms. Kinsley mentioned she did not see Williams when Johnson was shot. (Id., p 23.) She said she heard three gunshots. (Id., pp 24-25.) Ms. Kinsley said she saw a person wearing a white cap and a white shirt with blue writing. (Id., p 25.) She mentioned the person she saw was “leaning over the bushes to shoot,” and that at the time she thought the person was Tyrone Washington (the brother of Dominique Williams). (Id., pp 27-28.) Ms. Kinsley described the person shooting as a black male. (Id., pp 31-32.)

Peculiarly, the Dominique Williams initially called to testified was the wrong “Dominique Williams.” (Id., pp 36 and 102-03.)

Detective Neil Somers testified as investigating the shooting occurring on October 1<sup>st</sup>; that he interviewed Co-Defendant Reed; and that Reed mentioned Isaiah Smith and/or Orlando Smith may have been involved. (Id., pp 38-39.)

Detective Randy Khan testified he was involved in the investigation of the homicide of Johnson occurring on October 9<sup>th</sup>, and that he spoke with

Nancy Sepulvedo, who participated in a photographic showup that included Mr. Lopez's photograph and Gary LaBelle's photograph—both who were subjects of the investigation. (Id., pp 41-44.) He mentioned Gary LaBelle was also involved in the October 1<sup>st</sup> shooting as the driver. (Id., pp 45-46.) Detective Khan mentioned he obtained and analyzed cell phone records of individuals involved, which included Dominique Williams, Dennis Hoskins, Terry Johnson, Co-Defendant Reed, and Mr. Lopez. (Id., pp 52-54.) He said three days after the homicide, a text message from Reed contained the following: "I gotta 380 for sale 275 aww chrome." (Id., p 61.) Further, from Reed's phone, text messages involved statements about needing to "get low" or needing to "lay low." (Id., pp 62-63.) Khan said there was phone communication among Reed, Mr. Lopez, and Hoskins, but no communication among the defendants and Williams. (Id., pp 64-65.) He said there were numerous contacts between Williams and Johnson (the deceased). (Id., pp 66-67.) Khan indicated on the day of the murder Hoskins was in Bay City and arrived in the Saginaw area after the shooting. (Id., pp 81-82.) He admitted there were no calls between Reed and Hoskins prior to the murder during the relevant time period. (Id., pp 108-09.) Khan also admitted that Ms. Sepulvedo was shown a photographic array and could not identify the person she saw running. (Id., pp 120-21.)

Mr. Lopez requested that the testimony of Dennis Hoskins be stricken pursuant to MRE 804(a). (Transcript, "Jury Trial—Volume V of V," pp 4-5, 3/17/15.) The argument was that Hoskins was "unavailable" due to the prosecution's actions of threatening him. (*Id.*) In denying the motion, the court states: "Well, this is all very interesting and we've made a clear record of your positions. I'm going to deny the motion itself. The witness himself indicated he felt threatened; that's why he wasn't testifying. Mr. Dunn could say what he wanted to say, but I'm not going to take his testimony over the witness's testimony himself." (*Id.*, p 8.)

Thereafter, Dominique Williams (the actual person involved) testified she was in a relationship with Johnson; that she had seen him around 10:00 a.m. or 11:00 a.m. on the day of the murder; and that she had made threats to him. (*Id.*, pp 9-12.) She denied being involved in the murder. (*Id.*, pp 13-14.)

The parties rested, and the court instructed the jury. (*Id.*, pp 16-118.) After deliberations, the jury found Mr. Lopez guilty of First-Degree Premeditated Murder; four counts of Felony Firearm; Conspiracy To Commit First-Degree Premeditated Murder; Carrying A Dangerous Weapon With Unlawful Intent; and Felon In Possession Of A Firearm. (*Id.*, pp 119-20.) Regarding Co-Defendant Reed, he was also found guilty. (*Id.*, p 120.)

### Sentencing

On April 20, 2015, Mr. Lopez's sentencing hearing was held. (Transcript, "Sentence," 4/20/15.) The court sentenced Mr. Lopez to life without parole. (Id., p 6.)

Mr. Lopez requested the appointment of appellate counsel on April 20, 2015. ("Claim Of Appeal And Order Appointing Counsel," 4/29/15.) Appellate counsel was appointed on April 29, 2014. (Id.)

### Appellate Proceedings

Mr. Lopez filed his Brief on Appeal raising one issue: that the trial court erroneously determined that the prosecution's witness, Dennis Hoskins, was unavailable and the use of his preliminary examination testimony violated Mr. Lopez's right to confront his accuser. ("Defendant-Appellant's Brief On Appeal," 10/8/15.) Mr. Lopez argued that it was the prosecution that caused Hoskins not to testify by threatening him with perjury charges of a life offense if he testified differently from his preliminary examination testimony. (Id.)

The prosecution submitted its responsive brief, arguing that the Fifth Amendment privilege that Hoskins invoked made him unavailable and the use of his preliminary examination transcript was proper. ("Plaintiff-Appellee's Brief On Appeal," 12/10/15.) The prosecution alleges "[t]he lower court record plainly reflects that the witness [Hoskins] did not testify because he asserted his Fifth Amendment right against self-incrimination." (Id., p 6.) It

goes on to correctly state, however, that Hoskins said “he asserted the privilege because, ‘[t]he prosecutor’s told me—they threatened me with life in prison.’” (Id.)

In a 12-page unanimous opinion issued on August 18, 2016, the Michigan Court of Appeals vacated the convictions and remanded for a new trial, holding that, “[b]ecause the prosecutor’s threat procured Hoskins’ unavailability, the trial court erred by admitting Hoskins’ recorded testimony.” People v Lopez, \_\_\_ Mich App \_\_\_ (2016). The Court of Appeals details the facts of the case, noting Hoskins stated: “The prosecutor told me—they threatened me with life in prison.” Id.

In its analysis, the Court acknowledges the use of prior testimony of a witness can be admitted when a privilege is invoked. Id. However, the Court correctly points out in citing MRE 804(a), that a witness is not unavailable if the witness’s refusal to testify “is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.” Id.

After recounting precedent from the United States Supreme Court, the Michigan Supreme Court, and the Michigan Court of Appeals, the Court in the present case mentioned the trial court ruled “Hoskins invoked the Fifth Amendment because ‘he felt threatened; that’s why he wasn’t testifying.’ And because the prosecutor’s threats procured Hoskins’ unavailability, we hold that

a new trial is required.” Id. The Court mentions that the prosecution’s conduct went beyond advising and was threatening, stating: “The prosecutor’s statements exceeded mere advisement, and crossed into the realm of threat and intimidation.” Id. The Court reached this conclusion when recounting that “Hoskins had not yet offered any testimony, and whether he planned to recant his preliminary exam statements or testify falsely was unknown.” Id. Further, the Court mentions that statements by the prosecutor to Hoskins, who was represented by counsel, that he risked incarceration “for life” had gone into the area of threatening and intimidation. Id. The Court notes that the violation of the evidentiary rule was “far from harmless” as the case against Mr. Lopez “was thin at best” and the prosecution readily admitted that the case against Mr. Lopez “boils down to” Hoskins’ testimony. Id. Therefore, the Court vacated Mr. Lopez’s convictions and remanded for a new trial. Id.

The prosecution now seeks leave to appeal. (“Plaintiff-Appellant’s Application For Leave To Appeal,” 10/13/16.) On February 1, 2017, the Court entered an Order for supplemental briefing on two issues: “(1) whether prior testimony is admissible under MRE 804(b)(1) where the proponent of the statement has caused the declarant to be unavailable under MRE 804(a), regardless of any intent by the proponent to cause unavailability; and, (2) if some form of intent is required, what standards should apply when determining

whether the proponent's actions were intended to cause the declarant to be unavailable." ("Order," 2/1/17.)

### ARGUMENT

Defendant-Appellee Devaun Laroy Lopez's convictions must be dismissed because the trial court erred in allowing the use of Dennis Hoskins' preliminary examination testimony when the prosecution had caused Hoskins to be unavailable due to perjury threats. Secondly, case law suggests that intent is not per se required but a case-by-case approach is best suited to determine the issue.

#### **I. THE TRIAL COURT ERRED IN FINDING THAT DENNIS HOSKINS WAS UNAVAILABLE AND THUS ALLOWED THE ADMISSION OF HIS PRELIMINARY EXAMINATION TESTIMONY, WHICH VIOLATED DEFENDANT'S RIGHT TO CONFRONTATION**

Defendant-Appellee Devaun Laroy Lopez submits he was denied his right to confront his accuser when the trial court determined a key witness was unavailable and allowed the reading of the preliminary examination testimony.

Constitutional questions are reviewed de novo. People v White, 212 Mich App 298 (1998).

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the government's accusations.



Chambers v Mississippi, 410 U.S. 284, 294 (1973). The rights to confront and cross-examine witnesses and to call witnesses are essential to due process. Id.

The trial judge violated both Mr. Lopez's Sixth Amendment right to confront the witnesses against him and Michigan's rule against hearsay by admitting Dennis Hoskins' preliminary-examination testimony. Additionally, Mr. Lopez's due process rights to present a defense was violated by the trial court's ruling.

Former testimony is not admissible as a substitute for live testimony unless the witness is unavailable. The Sixth Amendment's Confrontation Clause bars admission at a criminal trial of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify." Crawford v Washington, 541 US 36, 53-54 (2004). Michigan's rule against hearsay similarly requires a showing of unavailability. MRE 804(b)(1). While former testimony can be admitted, the witness's unavailability cannot be due to the procurement or wrongdoing of the proponent of the former testimony:

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

MRE 804(a).



The United States Supreme Court held in Chambers v Mississippi, 410 US 284, 302-202 (1973), that trial errors cannot be permitted to “defeat the ends of justice” or otherwise deprive a defendant of his right to a fair trial.

In the present case, Hoskins’ “unavailability” was due to the prosecution. Hoskins did not testify because he was threatened by the prosecution with life in prison if he perjured himself. (Transcript, “Jury Trial—Volume III of V,” pp 4-6, 3/13/15; “Jury Trial—Volume IV of V,” pp 5-6, 3/16/15.) A day before the commencement of trial, Dennis Hoskins, who had implicated Mr. Lopez with his testimony at the preliminary examination, was represented by an attorney and stated his desire to testify at the trial. (Transcript, “Motion To Declare Witness Dennis Hoskins Unavailable,” pp 5-7, 3/10/15.) Hoskins became “unavailable,” however, due to the prosecution’s threats to persuade Hoskins from testifying. Hoskins states, in no uncertain terms, that: “The prosecutor’s told me – they threatened me with life in prison.” (Transcript, “Jury Trial—Volume III of V,” p 6, 3/13/15.) The prosecution’s threat was an implication that Hoskins was planning on testifying differently from his preliminary examination testimony and favorably for Mr. Lopez.

First, the prosecution’s threat of life imprisonment was not an accurate assessment of the law. With its threat of life imprisonment, the prosecution

assumes Hoskins' trial testimony would have been false. Second, a "term of years" sentence would have been possible even if Hoskins' trial testimony was false. And, third, Hoskins' preliminary examination testimony, Mr. Lopez argues, was the false testimony, subjecting Hoskins with a 15-year maximum.

Under MCL 750.422, it states:

Any person who, being lawfully required to depose the truth in any proceeding in a court of justice, shall commit perjury shall be guilty of a felony, punishable, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term of years, and if committed in any other case, by imprisonment in the state prison for not more than 15 years.

(Emphasis added.)

Considering the scant evidence against Mr. Lopez in the present case, it is much more plausible that Hoskins' preliminary examination testimony was the false testimony. As the Court of Appeals rightly acknowledged, that "aside from Hoskins' testimony, the evidence against Lopez was thin at best." The trial error in Mr. Lopez's case was a violation of the basic Sixth Amendment principle that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. US Const, Amend VI. In Crawford v Washington, 541 US 36, 53-54 (2004), the Supreme Court said that the right of confrontation is a "bedrock procedural guarantee," and it rejected the holding of Ohio v Roberts, 448 US 56, 66 (1980) that out-of-court statements of unavailable witnesses are admissible so long as there is "adequate

indicia of reliability – i.e., the statements fall within a ‘firmly rooted exception’ or bear ‘particularized guarantees of trustworthiness.’”

In the present case, the exception to the exception should have precluded the preliminary examination testimony of Hoskins being read into the record. The prosecution’s use of threats indicates it did not desire Hoskins to testify. The trustworthiness of Hoskins testimony is lacking as it was revealed he was providing his statement against Mr. Lopez and Co-Defendant Reed because he felt they were involved in accusing him of the October 1<sup>st</sup> shooting.

The cause for reversal in the present case is even more warranted than was the case in People v. Pena, 383 Mich. 402; 175 N.W.2d 767, 767–68 (1970).

In Pena, the prosecution sent a letter to the witness, stating:

Dear Madam:

In the interests of justice I am quoting Michigan Statutes Annotated 28.644, which provides as follows:

Any person who, being lawfully required to depose truth in any proceeding in a court of justice, shall commit perjury shall be guilty of a felony, punishable, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term \*of years, and if committed in any other case, by imprisonment in the state prison for not more than fifteen (15) years.

Very truly yours,  
G. E. Thick

People v. Pena, 383 Mich. 402, 405; 175 N.W.2d 767, 767–68 (1970)

The Pena Court determined: “For the court to conclude that the defendant could have a fair trial without directly questioning the witnesses, without ascertaining the effect of the letter and without attempting to reassure them, if possible, is not acceptable.” Id., at 406

In the present case, the trial court did speak with Hoskins, who made it clear he felt threatened. (Transcript, “Jury Trial—Volume I of V,” pp 11-16, 3/11/15.) The trial court acknowledges as much, and does nothing to rectify the threat. (Transcript, “Jury Trial—Volume V of V,” pp 4-5 and 8 3/17/15.) Instead of striking the testimony of Hoskins, the court allows the prosecutor’s threat to dissuade Hoskins from testifying.

Where a witness is singled out by the trial judge or the prosecution and threatened so that they are effectively driven off the witness stand, error will have occurred. See Webb v. Texas, 409 U.S. 95; 93 S.Ct. 351; 34 L.Ed.2d 330 (1972) and Pena, supra. Such has occurred in the present case where Hoskins, who was ready and willing to testify a day prior to trial, was driven off the witness stand by threats of perjury. This denied the right of Mr. Lopez to present a defense.

The Webb case cited Washington v Texas, 388 U.S. 14, 19; 87 S.Ct. 1920, 1923; 18 L.Ed.2d 1019 (1967) and quotes:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the

prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Webb v. Texas, 409 U.S. 95, 98; 93 S. Ct. 351, 353; 34 L. Ed. 2d 330 (1972).

Michigan has followed the Webb rationale. The case of People v Crabtree, 87 Mich App 722, 725; 276 NW 2d 478 (1979), in many respects, is similar to the present case. In Crabtree the Court noted the victim in a criminal sexual conduct case

wanted to drop the charges against the defendant and explained that "he didn't touch me" and that a police officer had pressured her into the charge in the first place. The prosecutor responded with a thinly-veiled threat of a perjury charge against the victim if she changed her story from that given at the preliminary examination (wherein she testified to the sexual act). At trial, this episode was revealed to the court and jury only as a result of the defense counsel's thorough cross-examination of the witness. On redirect the prosecutor announced "for the record", that "as Prosecutor of Van Buren County \* \* \* I do not intend to prosecute this person as a perjurer. I am just interested in the truth".

People v. Crabtree, 87 Mich. App. 722, 725; 276 N.W.2d 478, 479 (1979).

The Crabtree Court reversed the defendant's conviction due to improper influence upon the witness. This type of tactic was certainly intended to send a message, just as the present case—testify differently and suffer the consequences.

Mr. Lopez submits vacating his convictions is warranted as his rights to present a defense was violated. The prosecution's gamesmanship of threats to

persuade Hoskins not to testify was the “procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.” MRE 804(a). Without Hoskins’ testimony, the evidence against Mr. Lopez was negligible. Certainly, the cell phone records were insufficient to convict beyond a reasonable doubt. Further, the identification by Nancy Sepulvedo from a photographic array was nothing more than seeing a person who “looks the most like the runner” she had seen—not even identifying the person who shot—and was done eight days after the shooting. (Transcript, “Jury Trial—Volume II of V,” pp 140-44, 3/12/15.) Without Hoskins’ testimony of the preliminary examination, Mr. Lopez would not have been found guilty. Therefore, Mr. Lopez should be granted a new trial.

This Court should deny the prosecution’s application for leave to appeal. The Court of Appeals correctly analyzed this case and correctly held that “admitting prior testimony in clear violation of the evidentiary rules designed in part to protect a defendant’s right to confront the witnesses against him, the trial court violated Lopez’s fundamental right to a fair trial, abusing its evidentiary discretion. This error was far from harmless.”

## II. WHEN A PROSECUTOR ACTS IN A WAY “FOR THE PURPOSE OF PREVENTING THE WITNESS FROM ATTENDING OR TESTIFYING,” NO MORE INTENT REQUIRED

The Court has requested briefing on the following: “if some form of intent [that causes a declarant to become unavailable] is required, what standards should apply when determining whether the proponent’s actions were intended to cause the declarant to be unavailable.” Defendant-Appellee Devaun Laroy Lopez argues that the answer can be found in the court rule.

The court rule states:

“A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.”

MRE 804(a).

Stated another way, the declarant is not unavailable as a witness if refusal is due to the procurement of the proponent of a statement for the purposes of preventing the witness from attending or testifying. Further stating this another way for the purpose of this case: Hoskins was not unavailable as a witness when his refusal to testify was due to the procurement of the prosecution for the purpose of preventing Hoskins from attending or testifying.

Looking objectively at the facts, the prosecution's remarks about perjury sent the message to Hoskins. Once he testifies differently (and Mr. Lopez says truthfully), Hoskins will be charged with perjury.

The Court of Appeals in the present case cited People v. Callington, 123 Mich. App. 301; 333 N.W.2d 260, 263 (1983). A deeper look into Callington provides a compelling look into the intent question posed by this Court.

In Callington, the Court found the defendant in an armed robbery prosecution was denied his right to compulsory process when his only corroborating witness invoked his right to remain silent after the trial judge, in response to a request by the prosecutor in the witness' presence, discussed the witness' Fifth Amendment rights at great length with the witness. The prosecutor had asserted that by testifying the witness would be admitting to a probation violation that would possibly subject him to life imprisonment and that the prosecution intended to prosecute the witness if he admitted criminal involvement, and had asked the trial judge to inform the witness of his Fifth Amendment rights. Id. The trial judge proceeded to apprise the witness of his rights at length. Id. Although acknowledging the record did not reveal any intentional wrongful conduct on the part of the prosecutor, defense counsel, or the trial judge, the court held that the prosecutor's remarks were intimidating and drove the defendant's witness from the stand. Id. The court stated:



In every prosecutorial abuse question, the reviewing Court must examine the pertinent portion of the record and evaluate the alleged wrongful acts in context. A limited review of previous case law on prosecutorial or judicial abuse complaints reveals that such questions are usually decided on a case-by-case basis with each decision depending heavily on the peculiar facts before the Court.

. . . . .

An examination of the pertinent portion of the record in this case does not reveal any intentional wrongful conduct on the part of the prosecutor, defense counsel or the Court.

However, the prosecutor's remarks to the Court, in the presence of the witness, that he intended to possibly charge the witness with a new offense or to institute probation violation proceedings which could possibly result in a sentence of life imprisonment, were intimidating regardless of the factual accuracy of the statements and, coupled with the Court's additional and lengthy warnings, drove the defendant's witness from the stand. Even if the prosecutor's motives were impeccable, the implication of his statements transformed a willing witness to one who refused to testify.

*Id.*, 123 Mich. App. at 305-06. (Emphasis added.)

The bottom line is that government intimidation which causes a witness not to testify violates a defendant's due process rights under US Const, Ams V, XIV. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992); *People v Canter*, 197 Mich App 550, 569-570; 496 NW2d 336 (1992). See also, *People v Crabtree*, 87 Mich App 722, 725; 276 NW2d 478 (1979).

In *Webb v Texas*, 409 US 95; 93 S Ct 351; 34 L Ed 2d 330 (1972), the United States Supreme Court ordered a new trial where the trial court had admonished the sole defense witness that if the witness committed perjury, the trial court would personally see to it that the witness was prosecuted, and the

witness then declined to testify. The U.S. Supreme Court concluded that the trial court had violated the defendant's due process rights by driving the sole defense witness off the stand. Id. Interchange the trial court for the prosecutor, and the facts in the present case are the same. The intent was the same— “for the purpose of preventing the witness from attending or testifying.” See, MRE 804(a).

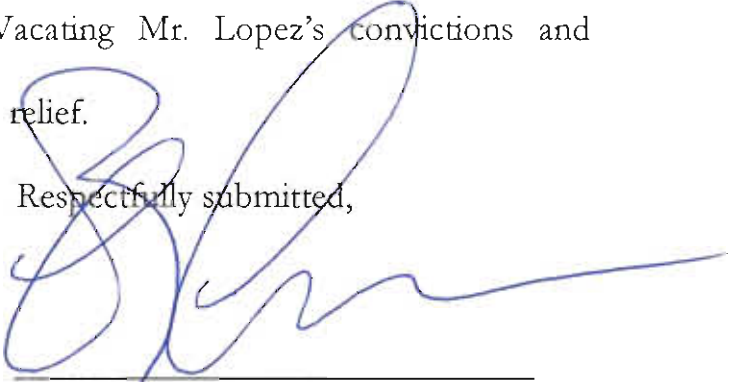
Reversing a conviction for carrying a pistol in a motor vehicle without a license, the court in People v Williams, 45 Mich App 623; 207 NW2d 176 (1973), held that the prosecutor overstepped his bounds when advising a prospective defense witness of her constitutional right not to testify against herself and told the witness that he would prosecute her either for carrying a concealed weapon or for perjury if she testified that the pistol found in the defendant's car was hers. Id. The witness had been prepared to testify that the gun was hers and that she had concealed it under a seat in the car herself. After the prosecutor's warning, however, defense counsel attempted to elicit this testimony from her, and she refused to testify on advice of her counsel. Id. In condemning the action of the prosecutor, the court noted that if the witness had testified as she originally planned, the jury might have found the defendant not guilty. Id. The court remanded for retrial, directing the trial judge and the prosecutor to determine a means of dispelling the intimidation of the witness which had already occurred. Id.

The above cases do not necessarily delve into the intent of governmental action. However, the Crabtree analysis seems the best suited—a case-by-case approach to determine if a comment/action was “for the purpose of preventing the witness from attending or testifying.” MRE 804(a).

### CONCLUSION

Defendant-Appellee Devaun Laroy Lopez respectfully asks this Honorable Court to deny the prosecution’s application for leave to appeal. The admission of Dennis Hoskins’ preliminary examination testimony denied Mr. Lopez his rights under the Constitution as Hoskins’ “unavailability” was due to the prosecution’s threats. Vacating Mr. Lopez’s convictions and remanding for a new trial is the proper relief.

Respectfully submitted,



Dated: March 14, 2017

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STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Case #: 14-040317-FC

CofA#: 327208

SCt#: 154566

DEVAUN LAROY LOPEZ,

Defendant-Appellee.

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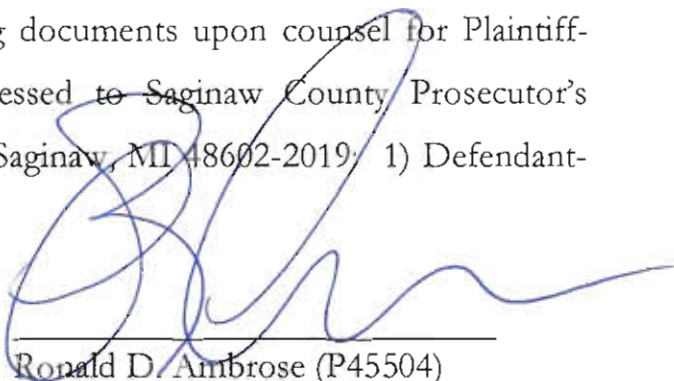
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**PROOF OF SERVICE**

I, Ronald D. Ambrose, attorney for Defendant-Appellee Devaun Laroy Lopez, certify that on March 15, 2017 I served through first class mail, postage fully prepaid, a copy of the following documents upon counsel for Plaintiff-Appellant, Nathan J. Collison, addressed to Saginaw County Prosecutor's Office, 111 South Michigan Avenue, Saginaw, MI 48602-2019: 1) Defendant-Appellee's Supplemental Brief.

Dated: March 15, 2017



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